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No. 97

UNITED STATES OF AMERICA,

PETITIONER

vs.

R. F. BALL CONSTRUCTION COMPANY, INC., and
UNITED PACIFIC INSURANCE COMPANY,

RESPONDENTS

Reply of United Pacific Insurance Company to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOSH H. GROCE
JACK C. HEBDON,

Attorneys for Respondent,
United Pacific Insurance Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 880

UNITED STATES OF AMERICA,
PETITIONER

vs.

R. F. BALL CONSTRUCTION COMPANY, INC., and
UNITED PACIFIC INSURANCE COMPANY,
RESPONDENTS

Reply of United Pacific Insurance Company to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The Respondent, United Pacific Insurance Company, in reply to the above styled petition for certiorari to the United States Court of Appeals for the Fifth Circuit says:

I.

The statement by Petitioner of the facts is substantially correct but the statement of the first question presented is misleading. The first "question presented" should be stated as follows:

> "Whether an indemnity mortgagee, namely a surety who takes collateral security to protect is against future contingent loss, comes within the term **'Any* mortgagee'** as used in Section 3672 of the Internal Revenue Code of 1939, which in effect subordinates federal tax liens to a prior lien of **'any mortgagee'**."

Petitioner, in support of its misleading statement of the first question, on page 10 of its petition says:

> "* * * in order to qualify as a 'mortgage' (or 'pledge') for purposes of Section 3672, surely an assignment to secure an indebtedness must—at the very least—relate to an **existing**** indebtedness, not merely an indebtedness that might arise in the future."

Petitioner cites no authority for this sweeping statement. We say, without fear of successful contradiction, that the reason the Petitioner cites no authority for this broad statement is that not only is there no authority to be found to support it but ample authorities are to be found directly to the contrary.

The indemnity mortgage in this instance was given to secure the surety on its contingent liability. More than 150 years ago, John Marshall, that great chief justice of the United States, in the case of **U. S. vs. Hooie,** 3 Cranch 73, 2. L.Ed. 370, upheld what are known in law as "indemnity mortgages". There, one Hooie went surety on a bond for one Fitzgerald to the United States and took an indemnity mortgage as security. In a contest of priorities between the United States and the surety, Chief Justice Marshall said:

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*Here, and throughout this brief, unless otherwise stated, the emphasis is supplied.

**Emphasis is the Petitioner's.

"The deed is made to save Hooie harmless on account of his having become the security of Fitzgerald to the United States * * *. All the covenants in the deed apppear to the court to be fair, legitimate and consistent with common usage."

The court then went on to uphold the mortgage to secure this contingent liability of the surety.

Such was likewise the situation in the very early Texas case of **Williams vs. Silliman,** 74 Tex. 626, 12 S.W. 534, where the Supreme Court of Texas upheld an indemnity mortgage to a surety in a very brief opinion which closed with the statement:

"The desire to indemnify his security against loss was a sufficient consideration for the execution of the mortgages."

41 **Corpus Juris,** 459 states as follows:

"D. INDEMNITY MORTGAGES — 1. VALIDITY IN GENERAL. It is well settled that a mortgage given by way of indemnity, that is, not founded on a present debt, but meant to secure the mortgagee against loss or damage in consequence of a contingent liability or responsibility which he has assumed or agreed to assume for and on behalf of the mortgagor, as surety, bail, indorser, or otherwise, is valid and enforceable.

"FUTURE LIABILITIES. An indemnity mortgage may be given to secure the mortgagee not only as against debts or liabilities for which he has already assumed responsibility or liability, but also to protect him against loss or damage on indorsements, suretyships, or other liabilities which he may in the future enter into for the benefit of mortgagor."

Many authorities from the various states are cited in support of these statements.

The same authority, on page 528, in discussing priorities of an indemnity mortgage, says:

> "A mortgage given to indemnify the mortgagee or to secure him against a secondary or contingent liability, such as that of an indorser or surety, may take precedence over liens created subsequent to its execution * * *."

On this same subject, 36 **Am. Jur.** 720, has the following to say:

> "A mortgage need not be founded on a present debt, but may be given to secure the performance of other obligations. The mortgage may be made to secure future advances or to indemnify against a contingency which may in fact never occur. It may be given to secure one as an indorser or as a surety upon a bond. The security of a mortgage given to indemnify sureties has been held not to be limited to the nominal money consideration recited, but to extend to the amount for which the sureties ultimately prove liable."

Similar statements are found in 59 C.J.S. 138 and 215.

It is submitted that Petitioner's statement of the law above quoted is wholly at variance with all of the authorities on the subject of indemnity mortgages.

Petitioner likewise on page 10 makes the statement, which is wholly unsupported by anything in the record, that "the indebtedness secured by the assignment did not come into existence until long after the federal liens were perfected." The obligation of the surety

came into existence on April 4, 1952, as found by the trial court (P. 16)* and as was stipulated (R. 8), which was more than a year prior to the fixing of the tax liens. It is true that the obligation which was assumed by the surety on April 4, 1952, was not discharged until after the filing of the tax liens in question, but nowhere in this record is there to be found either a stipulation or a finding or any evidence that the indebtedness of the surety "did not come into existence until long after the federal liens were perfected," as stated by petitioner. The precise time when it became known that there would be a loss on this bond is not to be found in the record. The only finding and stipulation being that the surety's obligation to pay was assumed more than a year prior to the fixing of the tax liens but was not actually paid until after the fixing of the tax liens. The payment after the filing of the tax liens was not a voluntary payment but the surety, as found by the trial court (R. 13) "was required to pay by virtue of its bond in connection with the Kentucky project, the sum of $12,971.88."

Suppose Jacobs, the taxpayer principal in this case, instead of giving an assignment of the retained percentages under the San Antonio contract as security to protect the surety on its contingent liability, had given a deed of trust on certain lands to the surety at the time it executed its Kentucky bond. Under all of the authorities heretofore cited, such a deed of trust (even though not technically denominated "a mortgage") would have been prior to any other claims arising thereafter. Can there be any substantial difference between a "deed of trust" and an "assignment as

*Throughout this Reply. "P." will refer to the page of the Petition for certiorari and "R." will refer to the page of the Record in the Court of Appeals.

collateral security"? Certainly no such distinction is apparent.

It is submitted that this Respondent's statement of the first Question Presented is an accurate statement and that the surety being an indemnity mortgagee is protected by Section 3672 as coming within the term "**any** mortgagee [or] pledgee."

II.

Under the heading "Reasons for Granting the Writ" (P. 6) the Petitioner gives four reasons why it claims this court should grant the Writ of Certiorari.

First, Petitioner says "the decision below is in direct conflict with the decisions of this court holding that the relative priority of a federal tax lien is a federal question." Petitioner has misconstrued the position of this Respondent and the courts below. This Respondent admits and neither of the courts below denied that the relative priority of a federal tax lien is a federal question. It is Hornbook law that the construction of a federal statute is a federal question.

Second, the Petitioner says that "the classes of lienors ("mortgagee, pledge [sic], purchaser, or judgment creditor) protected by Section 3672 of the Internal Revenue Code of 1939 (**supra**, p. 3) are to be defined in the usual and conventional sense of the terms."

Just what Petitioner claims to be the "usual and conventional" sense of the terms "mortgagee" and "pledgee" the Petitioner does not enlighten us by giving a definition, nor does Petitioner point out wherein an "indemnity mortgagee" does not come within the category of "**any** mortgagee (or) pledgee".

More than a century and a quarter ago this court in the case of **Conard vs. Atlantic Ins. Co.,** 1 Peters 386 at 441, 26 U. S. 189 at 213, said in defining the term "mortgage":

> "It is true that in discussions in courts of equity a mortgage is sometimes called a lien for debt. And so it certainly is and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law. * * *"

This court likewise at an early date in the case of **Willamette etc. vs. Bank of British Columbia,** 119 U. S. 191, defined a mortgage as follows:

> "A mortgage is in effect a sale with a power of defeasance which may ultimately end in an absolute transfer of title."

The property interests of the surety and the principal in this transaction, however, were not created by federal law. As was said by Judge Medina on February 8, 1957, in speaking for the Court of Appeals for the Second Circuit in the case of **Fidelity & Deposit Co. of N. Y. vs. N. Y. City Housing Authority, et al,** 241 F. 2d 142.

> "Section 3670 imposes a tax lien on 'all property and rights to property' of a defaulting taxpayer. In adopting this legislation, the Congress did not create property interests on which a lien might be imposed; there is no suggestion that it authorized the federal courts to do so. On the contrary, it took for granted here, as it normally does in the tax law, the vital existence of the state laws creating and maintaining various interests. The statute was fashioned to require the courts to determine for federal purposes whether those state-created interests are 'prop-

erty' or 'rights to property.' That classification of interests is a federal question; the existence of the interests to be federally classified, however, is solely a question of state law.

"This distinction was formulated by the Supreme Court in Morgan v. Commissioner, 309 U. S. 78, 80, which also involved the tax law. 'State law', the court explained, 'creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.' "

Turning then to the law of the state which created this interest, 29 **Tex. Jur.** 736 says:

"A mortgage in the broadest sense of the term is a pledge of property either real or personal or of a chose in action, as security for the performance of an obligation which ordinarily consists in the payment of money. In the language of Chancellor Kent, a mortgage is 'a conveyance of an estate or property by way of pledge for the security of a debt to become void on payment of it.' "

The courts below likewise cited 29 **Tex. Jur.** 838 wherein it is said:

"A mortgage which purports to secure future debts is not ineffectual or invalid. On the contrary, the lien created will be enforced, not only in a dispute between the mortgagor and mortgagee, but **also in a controversy involving the rights of one who claims under the mortgagor.**"

Of course, Petitioner is here claiming under the mortgagor because under Section 3670 the Petitioner's lien reaches only "*** property and rights to property whether real or personal belonging to" the mortgagor in this instance.

It is submitted that the surety in this case, being an indemnity mortgagee (or pledgee), came within the "usual" and "conventional" sense of the terms "any mortgagee [or] pledgee" within the meaning of Section 3672.

Petitioner gives as its third reason why this court should grant Certiorari the claimed fact that the decision below is in direct conflict with the decisions of this court holding "that the federal tax lien provided by Section 3670 (**supra**, p. 2) is entitled to priority as against inchoate liens not specifically protected by Section 3672". This is likewise an incorrect statement from two standpoints. First, this court has never held that a federal tax lien is superior to a mortgage (or pledge) merely because the debt secured by the mortgage (or pledge) was not due or was an indemnity mortgage or was not in an amount certain. Second, the courts below recognized that there are certain classes of liens, all of which are statutory in character, such as an attachment, garnishment, statutory landlord's, water rent, and other liens which, since they are not specifically protected by Section 3672, are inferior unless such liens are "choate". (For an interesting discussion of this court's coining of the word "choate" which term is not to be found in any ordinary dictionary see 42 Am. Bar Ass'n. Journal 608, July 1956). The decisions of this court using the term "choate" all have to do with the fourth category in Section 3672, to-wit: "judgment creditors", and this court has held that before one can come within the category of a "judgment

creditor" his judgment lien must be "choate" in the sense that it is perfected and complete. Never has this court, or any other court for that matter, finally determined that a mortgage (or pledge) must be "choate" in order to be protected under Section 3672.

Attention is called to the fact that in the vast majority of mortgages, pledges, or other contract liens, it cannot be determined at the time of the execution thereof how much of the mortgaged or pledged property or fund will have to be used for the payment of the secured debt. In most instances today the mortgagor pays off the debt secured by the mortgage and when this happens there is no need to resort to the pledged or mortgaged fund or property. In other pledges or mortgages, the pledgor or mortgagor pays off part of the debt. Furthermore, in most instances, the pledgor or mortgagor has the privilege which it sometimes exercises by paying it in advance, thereby reducing the amount of interest. Furthermore, in most mortgages or pledges, attorneys fees upon default are provided for and, of course, at the time of the execution of the mortgage it cannot be ascertained whether or not attorneys fees will be added to the amount of the mortgaged debt nor how much interest will be due and payable ultimately out of the pledged or mortgaged fund or property.

It is obvious, therefore, that practically no mortgage today is complete or "choate" at the time the pledge or mortgage is made. Such was definitely the case in connection with the commissions to be earned by the creditor "when they shall become available to him" in the case of **National Refining Company vs. U. S.** 160 F 2d 951, since at the time of the assignment no commissions had accrued to the creditor and it was possible that no commissions would ever be earned.

Likewise the assignment of future wages in the case of **Knight vs. Knight,** 71 N. Y. Sup. 2d 357, affirmed by the court of last resort of New York, 80 N. E. 2d 344, was not complete or "choate" at the time it was given because the wages at that time had not been earned and such wages might never have been earned.

The amount of what ultimately would be the retained percentages under the assignment thereof was equally uncertain in **Northern Nat. Bank vs. Northern Minn. Nat. Bank,** 70 N. W. 2d 118 and in **U. S. F. & G. vs. U. S.** 20 Fed 2d 118. Just as was the extent of the property assigned in the case of **U. S. vs. Gargill,** 218 Fed. 2d 556.

In all these instances, the courts held that the assignments, or mortgages, or pledges, were superior to the subsequently filed tax liens. Many other similar instances could be cited.

As its fourth reason why this court should grant the writ, Petitioner claims that the decision below is in conflict with the decisions of this court holding that "the doctrine of relation back cannot operate to destroy the realities of the situation."

This Respondent did not urge upon the courts below the equitable doctrine of relation back and the courts below did not decide this case on any such doctrine. The courts below held that the surety being an indemnity mortgagee (or pledgee) within the meaning of Section 3672 was protected and there was no occasion to resort to the equitable doctrine of relation back.

All of the authorities relied upon by petitioner are cited on pages 6 and 7 of the petition for Writ of Certiorari. As stated above, all of these authorities have to do with the construction of the term "judgment creditor" as contained in Section 3672. None of them even

purport to deal with the terms "**any** mortgagee [or] pledgee". Petitioner, however, states (P. 11) in effect that these cases lay down the broad "rule" that a perfected federal tax lien is entitled to priority as against an "inchoate lien" even though the inchoate lien may be a mortgage, pledge, or other contract right entered into long prior to the perfecting of the tax lien. The decisions of this court do not support any such assertion, as will be demonstrated.

It will be recalled that in the Internal Revenue Act of 1939, Title 26, U.S.C., Section 3672, it is provided that a subsequently filed federal tax lien "shall not be valid as against **any** mortgagee, pledgee, purchaser, judgment creditor, etc."

In the case of **U. S. vs. Security Trust & Savings Bank,** 340 U.S. 47 (1950) this court held that an attachment lien in California which had not ripened into a final judgment so as to make the holder of such lien a "judgment creditor" was inferior to a federal tax lien which was filed after the attachment lien was levied but before the judgment became final, since mere attachment liens as such were not protected specifically under Sec. 3672.

Thereafter this court in 1953 in the case of **U. S. vs. Gilbert & Associates,** 345 U.S. 361, held that a municipality holding a tax lien for municipal taxes against certain properties was not a "judgment creditor" within the meaning of Section 3672 and that the federal tax lien was superior to the municipal tax lien which was not specifically protected by Section 3672.

Thereafter in 1954 this court handed down its decision in the case of **U. S. vs. City of New Britain,** 347 U.S. 81 in which it held that a lien for municipal taxes and statutory water rent liens which had not

ripened into judgment at the time of the filing of the federal tax lien were subordinate to a federal tax lien since they were not protected by Section 3672.

Thereafter on January 10, 1955, this court handed down its decisions in the cases of **U. S. vs. Acri,** 348 U.S. 211, **U. S. vs. Liverpool, etc. Ins. Co.,** 348 U.S. 215, and **U. S. vs. Scovil,** 348 U.S. 218.

In the **Acri** case this court held that the holder of an attachment lien similar to the attachment lien in the **Security Trust & Savings Bank** case, supra, until the judgment became final did not come within the term "judgment creditor" and therefore was not protected under Section 3672.

In the **Liverpool** case this court held that the holder of a garnishment lien before final judgment was not a "judgment creditor" within the meaning of Section 3672, and in the **Scovil** case this court held that the holder of a statutory landlord's lien prior to the time the same ripened into a final judgment was not a "judgment creditor" within the meaning of Section 3672.

Summary reversals were made by this court in the cases of **U. S. vs. Colotta,** 350 U.S. 808, and **U. S. vs. White Bear Brewing Co.,** 370 U.S. 1010, relative to unperfected statutory mechanics liens which had not ripened into final judgments and therefore were not protected under Section 3672. Such was also the holding of the Court of Appeals of the Second Circuit in the case of **U. S. vs. Kings County Iron Works,** 224 Fed. 2d 232.

All of the above cases which are relied upon by Petitioner were constructions of the term "judgment creditor" under Section 3672. None of these cases undertook to construe or discuss contractual rights

such as indemnity mortgages (or pledges), or assignments such as the one involved in the case at bar but Petitioner now says that "there is no basis for assuming that Congress in enacting Section 3672 intended different priority standards to apply to the designated non-statutory liens and statutory liens" (P. 11) or, as Petitioner said in the courts below, "the principles of **U. S. v. Security Trust & Savings Bank, U. S. v. New Britain, U. S. v. Scovil, U. S. v. Acri,** and **U. S. v. Liverpool & London Ins. Co.,** supra, must be applied." (R. 15, P. 19).

As was stated by the courts below (P. 22) "The distinction between a contract lien and a statutory lien is made clear by comparing the case of **Evans vs. Stewart,** (66 N. W. 2d 442) with the **Scovil** case, supra. In the **Scovil** case, the Supreme Court held that prior to the time it ripened into a final judgment an incompleted statutory landlord's lien was inferior to a federal tax lien since the holder thereof was neither a 'mortgagee,' 'pledgee,' 'purchaser,' nor 'judgment creditor.' In the **Evans** case, the court held that a written contract landlord's lien contained in the lease was superior to a federal tax lien because it was a 'mortgage' within 3672."

The Petitioner argued in the courts below and inferentially argues here that because the parties to the indemnity mortgage involved here did not place the label on the transaction of the surety becoming a "mortgagee," "pledgee," or "purchaser," its contract right acquired long prior to the filing of the tax lien must fail, but as stated by the courts below "courts do not decide cases on nomenclature. They look to the substance of the transaction and the substance of the assignment here was to put the bonding company

in the status of either a mortgagee, pledgee, or purchaser and, therefor, Section 3672 applies."

This court recently said in the case of **Cahill vs. N. Y. N. H. & H. Ry. Co.**, 351 U.S. 183:

> "The substance of the pleadings and not their labels should govern our actions."

So here the substance of the transaction between the surety and the principal and not the label should govern this court's action.

As stated above, Petitioner says that "there is no basis for assuming that Congress in enacting Section 3672 intended different priority standards to apply to the designated non-statutory liens than to statutory liens." With this statement we take issue. There is good basis for assuming just to the contrary.

After all the problem before this court is to determine what the Congress had in mind when in Section 3672 it used the terms "**any** mortgagee [or] pledgee" and the use of the word "**any**" gives a clear indication of the congressional intent. In 1954 Congress was in the process of completely revamping the Internal Revenue Code and it had before it the question as to whether or not Section 3672 of the 1939 Code should be amended. Appendix A to this brief is the complete report of the Committee on Ways and Means in the House of Representatives and Appendix B hereto is the report of the Committee on Finance of the United States Senate having to do solely with amending Section 3672. It will be noted that in the House report it was suggested that just who is "**any** mortgagee [or] pledgee" should be spelled out and in explanation of this suggestion the Committee report says:

> "'This subsection is not designed to extend the protection of subsection (a) of this section to

categories of persons now denied protection by existing court decisions (under Section 3672(a) of the 1939 code) which determine who is a mortgagee, pledgee, purchaser, or judgment creditor by reference to **the realities and the facts in a given case rather than to the technical form or terminology used to designate such person.**"

The Senate report rejected the House proposal as being unnecessary and with the subsequent concurrence of the House Section 3672 was left intact because, as said by the Senate report:

"Subsection (c) of the House bill provided certain rules with respect to the validity of the tax lien, without the filing of notice thereof, as against mortgagees, pledgees, purchasers, or judgment creditors. The applicable rules have been developed under existing law by judicial construction, and your committee deems it advisable to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules. The deletion of subsection (c) will continue in effect the existing law.

"This section corresponds to section 3672 of the 1939 Code. **As under existing law, a person who is in fact a mortgagee, pledgee, purchaser, or judgment creditor will be entitled as such to the protection of this section irrespective of the designation applied to such person under State law,** for example, in a State which has adopted the Uniform Commercial Code and which uses other terms to describe such persons."

In other words, in 1954 Congress was satisfied with the then court decisions construing the term "any mortgagee, etc." to the effect that regardless of the

label placed on a contract lien creditor if he was "in fact a mortgagee, (or pledgee)" he would be protected and Congress was likewise satisfied with the existing court decisions which determined who is any mortgagee or pledgee "by reference to the realities of the facts in a given case rather than the technical form or terminology used to designate such persons."

What were these decisions that Congress was satisfied with? They were the very decisions now relied upon by this Respondent in this case, such as **Knight vs. Knight**, supra, **National Refining Co. vs. U. S.** supra, **U. S. vs. Anders Contracting Co.**, 111 Fed. Sup. 70 and the other cases heretofore referred. Is there any reason in justice why an "assignment as collateral security" should not be protected as coming within the term "**any** mortgagee" but the holder of a "deed of trust" or "conditional sales contract" or an "assignment of future wages" or "an assignment of future commissions" should. We submit not. But that is exactly what the Petitioner is contending for in this case unless Petitioner is seeking to have this court overturn all of the above decisions with which Congress was satisfied in 1954.

In the case of **Evans vs. Stewart**, supra, in discussing Section 3672 the Supreme Court of Iowa held in line with the above expressed intent of the Congress that:

> "We feel the requirement that the lien holder be a 'mortgagee' is a requirement of status—that he be in the position of one holding a mortgage."

Such was also the holding of the United States Court of Appeals for the First Circuit in the case of **U. S. vs. Gargill**, supra, where the court in construing Section 3672 said:

> "If the three trustees named in the agreement of February 19, 1952 acquired the status of 'mortgagee' because of the transaction occurring on that date and this prior to the filing of the notice of the tax lien by the collector on June 24, 1952, their lien is senior and is to be preferred over the lien of the Government."

The unpublished opinion of the trial court in the **Gargill** case seems pertinent wherein the trial court in construing Section 3672 said:

> "It seems to me plain that it was the intention of Congress that a mortgage or pledge of any sort should be given priority over an unrecorded tax lien. **It makes no difference whether the mortgage corresponds to the ancient English form or some other form.** It makes no difference whether it is to secure antecedent debt or newly acquired debt. It makes no difference whether the mortgagee is left in possession or not left in possession. **The only thing which is required is that the transaction be such that the person or persons claiming to have the mortgage shall have that kind of security which involves either a transfer of title or a lien which is of a nature that gives the holder a right in rem with respect to the property and privilege to precede unsecured creditors. The phrases used in the statute were not used with some medieval notion of mortgage, pledge or the like. The whole object of the Congressional legislation is not to resurrect a page of Year Book history but to give that protection which persons in a modern world associate with the security they have achieved as a result of their diligence and forethought."**

The statements above quoted from the **Gargill** case are borne out by Mr. Justice Jackson's concurring opinion in the case of **U.S. vs. Security Trust & Savings**

Bank, supra. Justice Jackson there goes into the legislative history of Section 3672 and he points out that when this Section was adopted in 1939 the Congress itself stated that its intention was to prevent federal tax liens from seriously interfering with "business transactions." For this court to do what Petitioner urges would "seriously interfere with business transactions." As pointed out heretofore, practically no mortgage in existence today is "choate" in the sense that it is a thing complete. Furthermore, the security of the retained percentages taken by assignment or indemnity mortgage by sureties in construction bonds are taken into consideration in fixing the premiums on construction bonds and if this security be denied the premiums on construction bonds will have to be increased and it will be much more difficult for a small contractor, or in some instances even a large one, to secure sureties on their construction bonds. It can readily be seen that a holding by this court such as Petitioner urges would "seriously interfere with business transactions" which is the thing that Congress has avidly guarded against.

The Petitioner in this case says (P. 11):

> "In this case the **advances** for which the bonding company seeks 'mortgagee' status were not made for several months after the federal liens had been recorded."

Just why the Petitioner should use the word "advances" in describing the payment made by the surety on an obligation which it assumed long prior to the filing of the tax lien is not clear unless it is for the purpose of misleading this court. Webster defines the term "advance":

> "To furnish, as money or other value, before it is due, in aid of an enterprise; to supply beforehand."

Of course the surety here did not "advance" any money. It merely discharged an obligation incurred long prior to the filing of the tax liens.

Had this been a voluntary "advance" by the surety then such decisions as **U.S. vs. Phillips,** 198 F. 2d 634 might be applicable but as found by the trial court the payment by the surety was not an "advance" in any sense of the word but was a payment which the surety "was required" to make by virtue of the obligation assumed more than a year prior to the filing of the tax lien.

Petitioner further says: (P. 11)

> "Prior to the recording of the federal liens, there was at most a mere possibility that the taxpayer might become indebted to the bonding company. Such a mere possibility is plainly insufficient to constitute a specific and choate lien under this court's decisions. (**supra**). For like reasons, such a mere possibility is insufficient to entitle the bonding company to the status of a mortgagee under Section 3672."

Indemnity mortgages are intended as security against just such possibilities. The Petitioner cites no authority for this broad statement and again we say that no authority in support thereof can be found but ample authorities to the contrary have heretofore been cited by this respondent to the court.

Petitioner further says: (P. 11)

> "And even assuming **arguendo*** that the 1951 assignment matured into a 'mortgage' (or 'pledge') in December 1953 and March 1954

*Emphasis Petitioner's.

when the bonding company made its **advances***, this court's decisions have also made it clear that the doctrine of relation back will not be permitted to destroy the realities of the situation."

This respondent is not contending that its indemnity mortgage "matured" when it made its payments. It is contending that its indemnity mortgage arose and became effective at the time it was given, for as stated in the case of **Hawkins vs. Savage,** 110 F. Sup. 615:

> "A lien 'arises' at the time it comes into being or is created."

The indemnity mortgage of the surety in this instance came into being and was created in 1951, approximately two years prior to the filing of any tax liens. Again the Petitioner incorrectly uses the term "advance" to describe the payments which were required to be made by the surety because of an obligation which it assumed a year before any tax liens were filed and as this respondent has stated before, this respondent is not relying and has never relied in this case on the equitable doctrine of relation back.

It is, therefore, submitted that none of the four reasons given by Petitioner as to why this court should grant certiorari in this case is tenable.

III.

Although this Respondent is not pecuniarily interested in the subsidiary question presented of whether or not interpleaders' attorneys' fees can be allowed as against the Petitioner, this Respondent is interested

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*Emphasis Petitioner's.

in a speedy disposition of this matter so that the money which has been lying in the registry of the court for approximately three years without interest, may be drawn down and put to use. This Respondent believes that the lower courts were correct in holding in line with the decision in **U.S. vs. Ullman,** 115 F. Sup. 211, that such interpleaders' fee should be allowed and the Court of Appeals for the Fifth Circuit in this case is the first Court of Appeals to pass upon this question.

Only the sum of $256.67 is involved in this matter so that actually the doctrine of **de minimus non curat lex** could well be applicable. However, should this court feel that the courts below were in error in depriving Petitioner of this less than $256.67 in this multi-thousand dollar suit, it is suggested that certiorari be granted and only that portion of the judgments of the lower courts having to do with attorneys fees against Petitioner be summarily reversed so that this Respondent will not be deprived of its money any longer.

SUMMARY OF ARGUMENT AND CONCLUSION

The judgments of the lower courts in this case were correct. This Respondent being an indemnity mortgagee whose contract right vested long prior to the filing of any federal tax liens, has the superior right to the funds in the registry of the court and the petition for certiorari should be denied.

In the alternative, should this court feel that the lower courts erred only in connection with the award of attorneys fees to the Petitioner's prejudice of only $256.67, this court should summarily reverse only that

portion of the lower courts' judgment having to do with attorneys' fees and affirm as to the surety.

Respectfully submitted,

Jack C. Hebdon

JACK C. HEBDON
Attorney for Respondent
United Pacific Insurance Company

OF COUNSEL:
JOSH H. GROCE

I hereby certify that on the 18th day of April, 1957, I deposited in a U.S. Mail box with air mail postage prepaid, three copies of the foregoing reply directed to the Solicitor General, Department of Justice, Washington 25, D.C. in compliance with Supreme Court Rule 33 and I further certify that on the same date I deposited in a U.S. Mail box three copies of this reply directed to Richard U. Simon, Oil & Gas Building, Fort Worth 2, Texas, Attorney for R. F. Ball Construction Company, Co-Respondent, with first class postage prepaid.

APPENDIX A

EXCERPT FROM REPORT OF THE COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, TO ACCOMPANY H.R. 8300—HOUSE REPORT NO. 1337, DATED MARCH 9, 1954. 83rd CONGRESS. UNITED STATES GOVERNMENT PRINTING OFFICE. Page A406

Section 6323. **Validity against mortgagees, pledgees, purchasers, and judgment creditors**

This section corresponds to section 3672 of the 1939 code. Subsection (b) makes it clear that the notice of lien shall be valid, notwithstanding any law of the State or Territory regarding the form or content of a notice of lien, if the notice is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2) of this section. The Treasury Department has consistently taken the position that section 3672 of the 1939 code and the corresponding provisions of prior law authorize the State or Territory only to designate the local office for the filing of the notice of the lien. Subsection (b) is designed to eliminate any question as to the validity of the lien as against mortgagees, pledgees, purchasers, and judgment creditors, where notice thereof is filed in the office designated by the law of the appropriate State or Territory, even though the notice does not comply with other requirements of the law of the State or Territory as to the form or content of the notice. For example, the omission from the notice of lien of a description of the property subject to the lien would not affect the validity thereof, even though the law of the State or Territory requires that the notice of lien contain a description of the property subject

to the lien. Subsection (b) of this section is declaratory of the existing procedure and in accordance with the long-continued practice of the Treasury Department.

Subsection (c) makes it clear that the protection of subsection (a) of this section is not extended to a mortgagee, pledgee, or purchaser who takes with notice or knowledge of the existence of the Federal lien; and that such protection is not extended to a judgment creditor who does not have a valid judgment obtained in a court of record and of competent jurisdiction or to a judgment creditor who does not have a lien which has been properly perfected under such a judgment. This subsection is not designed to extend the protection of subsection (a) of this section to categories of persons now denied protection by existing court decisions (under section 3672 (a) of the 1939 code) which determine who is a mortgagee, pledgee, purchaser, or judgment creditor by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. Paragraph (1) of subsection (c) provides that the lien shall be valid, without the filing of notice thereof, as against any mortgagee, pledgee or purchaser, if such mortgagee, pledgee, or purchaser had notice of knowledge of the existence of the lien at the time the mortgage, pledge, or purchase, was made. A dual requirement is set forth in paragraphs (2) and (3) of this subsection which a judgment creditor must meet to be entitled to the protection of the notice provisions of subsection (a) of this section. One requirement is that the judgment creditor must have actually obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money; and the other requirement is that the judgment creditor, in the case

of a valid judgment for the recovery of a certain sum of money, must have a perfected lien under such judgment on the property as to which the claims of the contesting parties relate. Furthermore, subsection (c) makes clear that particular persons shall not be treated as judgment creditors because State or Federal law artificially provides or concedes such persons rights or privileges of judgment creditors, or even designates them as such, when they have not actually obtained a judgment in the conventional sense.

Subsection (d) of this section is in all material respects the same as existing law.

Subsection (e) of this section makes it clear that the Secretary may, after a notice of lien has been filed (and such notice discloses the amount of the outstanding liability as of the time of filing), disclose the extent to which the original obligation has been reduced by subsequent payments. This is necessary for the protection of persons dealing with property subject to the lien who have a legitimate interest in determining the amount of the outstanding obligation, as well as to aid reestablishment of the taxpayer's credit.

APPENDIX B

EXCERPT FROM REPORT OF THE COMMITTEE ON FINANCE, UNITED STATES SENATE, TO ACCOMPANY H.R. 8300—UNION CALENDAR NO. 1635, DATED JUNE 18, 1954. 83rd CONGRESS. REPORT NO. 1622, PRINTED IN THE U.S. GOVERNMENT PRINTING OFFICE, Page 575

Section 6323. **Validity against mortgagees, pledgees, purchasers and judgment creditors**

This section corresponds to that of the House bill except for the deletion of subsection (c) of the House bill and conforming changes incident to such deletion.

Subsection (c) of the House bill provided certain rules with respect to the validity of the tax lien, without the filing of notice thereof, as against mortgagees, pledgees, purchasers, or judgment creditors. The applicable rules have been developed under existing law by judicial construction, and your committee deems it advisable to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules. The deletion of subsection (c) will continue in effect the existing law.

This section corresponds to section 3672 of the 1939 Code. As under existing law, a person who is in fact a mortgagee, pledgee, purchaser, or judgment creditor will be entitled as such to the protection of this section irrespective of the designation applied to such person under State law, for example, in a State which has adopted the Uniform Commercial Code and which uses other terms to describe such persons.

Subsection (b) of this section makes it clear that the notice of lien shall be valid, notwithstanding any law of the State or Territory regarding the form or content of a notice of lien, if the notice is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2) of this section. The Treasury Department has consistently taken the position that section 3672 of the 1939 Code and the corresponding provisions of prior law authorize the State or Territory only to designate the local office for the filing of the notice of the lien. Subsection (b) is designed to eliminate any question as to the validity of the lien as against mortgagees, pledgees, purchasers, and judgment creditors, where notice thereof is filed in the office designated by the law of the appropriate State or Territory, even though the notice does not comply with other requirements of the law of the State or Territory as to the form or content of the notice. For example, the omission from the notice of lien of a description of the property subject to the lien would not affect the validity thereof, even though the law of the State or Territory requires that the notice of lien contain a description of the property subject to the lien. Subsection (b) of this section is declaratory of the existing procedure and in accordance with the long-continued practice of the Treasury Department.

Subsection (c) of this section as redesignated by your committee is in all material respects the same as existing law.

Subsection (d) of this section as redesignated by our committee makes it clear that the Secretary may, after a notice of lien has been filed (and such notice discloses the amount of the outstanding liability as of the time of filing), disclose the extent to which the original obligation has been reduced by subsequent payments.

This is necessary for the protection of persons dealing with property subject to the lien who have a legitimate interest in determining the amount of the outstanding obligation, as well as to aid reestablishment of the taxpayer's credit.